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ABSTRACT

In this paper, the author defines due process, discusses its elements, describes its minimum essentials, and examines court cases which apply the doctrine to teachers, administrators, and students. The court cases discussed by the author indicate situations in which due process is mandated and the extent of due process required in these situations. According to the report, an accused is due notice of his shortcomings and an opportunity to appear and face his accusers. Further, the accused, in most instances, is entitled to counsel, to a fair and impartial hearing, and the right to appeal his case to other authority. (Author/JF)

DUE PROCESS FOR STUDENTS, TEACHERS AND ADMINISTRATORS IN SUBURBAN SCHOOL DISTRICTS

by

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Sources of Due Process

We can thank the founding fathers for insisting on due process of law. Had they not distrusted governmental domination of the individual, they would not have held out for a Bill of Rights, and things would have been quite different. After an abortive attempt to go it without such guarantees, in 1791 the colonists finally ratified the new document by including assurances that individual citizens would be forever insulated against the inroads of governmental intrusion. It is to their disenchantment with the sovereign power of the State that we owe our own peculiar guarantee of due process of law today.

The Fifth Amendment protects the individual citizen against double jeopardy and self-incrimination, and guarantees that no person shall be deprived of life, liberty or property without "due process of law." This latter phrase was incorporated into the Fourteenth Amendment in 1868 to guarantee civil rights to those freedmen who were at the mercy of unscrupulous carpetbaggers following the War Between the States. Thus, it comes as no surprise that every American is guaranteed due process of law, not once, but twice by the Constitution of the United States of America.

Even without these assurances, there are extensive state-level guarantees that an individual citizen shall have access to due process as a matter of right. State constitutions, statutes, and decisions of many administrative bodies all are to the same effect: due process of law is the cornerstone of our civil liberties. Without that foundation, individual civil rights and criminal protections would mean nothing.

The purpose of due process, therefore, is to restrict governmental intervention into the lives of its citizens, so that at no time and at any

place shall the power and sovereignty of the State legally intrude into protected areas reserved to the individual. Where the individual is weak, these guarantees make him equal to us all, collectively and severally, balancing his legitimate interests over against those of the government in the scales of justice. Under this plan, no person, no matter how ungifted, or poor or sick or deprived, shall suffer indignity to his person at the hands of the State. Not that due process will make up for all the inequities among and between men--that is not its purpose. Rather, the purpose of due process is to guarantee essential fairness between the individual and the State, to the end that all free men may indeed say with Longfellow[1]:

> Alike, were they free from
> Fear, that reigns with the tyrant, and
> envy, the vice of republics.

Due process was the gift of those Englishmen who insisted at Runnymede in 1215 that King John relinquish some of his powers or face dire consequences from an aroused citizenry. The document John was forced to sign contained among others these memorable words:

> No free man shall be arrested or detained in prison, or deprived of his freehold, or outlawed or banished, or in any way molested; and we will not set forth against him, or send against him, unless by lawful judgment of his peers and by the law of the land. . . .To no one will we sell, or to no one will we refuse, or delay, right or justice.

The canon law of the Middle Ages likewise produced protections for those forced to flee from the state's wrath, who found sanctuary within the walls of the Church. Due process thus took on a moral dimension, an essential

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[1]Henry Wadsworth Longfellow, Evangeline, Part I, 1.

ingredient of the concept even today. In their small volume The Lessons of History, Will and Ariel Durant summarized due process with these words:

> History teaches us that life is competition. Competition is not only the life of trade, it is the trade of life, peaceful when food is in abundance, violent when the mouths outrun the food. Animals eat one another without qualm; civilized men consume each other by due process of law.[2]

Insofar as history is concerned, then, due process is an attempt to equalize the natural inequities found in our environment. The Durants continue:

> Inequality is not only natural and inborn, it grows with the complexity of civilization. Hereditary inequalities breed social and artificial inequalities; every invention or discovery is made or seized by the exceptional individual, and makes the strong stronger, the weak relatively weaker, than before. Economic development specializes functions, differentiates abilities, and makes men unequally valuable to their group. If we knew our fellow men thoroughly we could select thirty percent of them whose combined ability would equal that of all the rest. Life and history do precisely that, with a sublime injustice reminiscent of Calvin's God.[3]

Difficulties with Definition

Thus, due process historically derives from the natural law declaration that all men are created equal, but altered by the common sense observation that some are more equal than others. Because it is supposedly un-American to stand by and watch an unfair fight, due process legitimizes the natural law concept to the point where society says that every man, woman and child shall have his day in court, his right to be present and confront his accusers. The word "due" means owing and payable, coming from the same root as "duty." It is the duty of the State to see that all men are created equal before the bar of justice. While due process means essential fairness, in actual practice

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[3] Id., at 20.

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[2] Will and Ariel Durant, The Lessons of History (New York: Simon and Schuster, 1968), page 19. The volume is a summary of the larger work, The Story of Civilization, 10 volumes, completed in 1968.

it is entirely circumstantial, depending upon a given set of facts which surround each case. Hence, one cannot draw up a definition which will fit any and all situations without exception. We come now to the first of several puzzles governing due process of law.

Two Elements of Due Process

Two elements are necessary for recovery under terms of a statute or rule which allegedly deprive an individual of his rights. First, the plaintiff must demonstrate that the defendant has deprived him of a right secured to him by the Constitution and laws of the United States. Second, the plaintiff must show that the defendant deprived him of this right under "color of state law."

Two questions surface when an incident arises which might require due process of law: (1) Is procedural due process required in this particular situation? and (2) If due process is required, what are the minimal essentials of procedural due process required to satisfy this particular set of circumstances? The first question relates to the substantive reasons for using due process and the second involves the adequacy of the procedures utilized in order to do so. A look at each of these questions is in order.

Is due process required? Experience has shown that the more severe the penalty, the more likely are the courts to require a larger measure of due process of law. One must look to the nature (not the weight) of the interests at stake since substantive due process dictates that one cannot be punished for an impermissible reason, such as an unfair rule, unfairly applied. The recent Roth and Sindermann cases are in point.[4] You may recall

[4]Board of Regents v. Roth, 92 S.Ct. 2701; Perry v. Sindermann, 92 S.Ct. 2694 (1972).

that the issue in each case was whether outspoken teachers were legally non-renewed because of their free exercise of the speech privilege. David Roth was a first-year teacher employed on a one-year contract. When the Regents failed to renew the contract, Mr. Roth brought action alleging denial of free speech in that he had openly criticized administrative policies. Failure to give him notice and reasons for his non-renewal, he felt, denied him due process of law. The Supreme Court rejected his claim, holding instead that he had failed to show a deprivation of "liberty" or "property" in his position. He was at liberty to seek work elsewhere, inasmuch as the regents had not made any charges against him "that might seriously damage his standing and associations in the community," nor attach to him "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." If the board had done that, said the Court, "this would have been a different case." Nor did the State invoke any regulation to bar Mr. Roth from further employment in other public educational institutions in the State. "Had it done so, this, again, would be a different case."

The lesson here is that the board should make certain that in its act of non-renewal a) it is convinced that the teacher does not have tenure, so as to assert a property interest in his position, and b) it is not vindictive against the teacher so as to make that teacher less attractive to prospective employers down the line. If you do, yours will be a different case.

In Sindermann, on the other hand, the fact situation was similar but with one essential difference: he had been employed there for 10 years. The Court said that even though the board rejected the idea of tenure for its faculty, Mr. Sindermann, through his years of service, had acquired a de facto tenure right despite such a lack of statutory assurance. "Property,"

said the Supreme Court, in upholding his right to continuing employment, "denotes a broad range of interests that are secured by existing rules and understandings." A person's interest in a state controlled benefit is a "property" interest which the State may not deprive one of if there are such rules or mutually explicit understandings that may be the basis for de facto tenure. In this respect, the regents had failed to provide Mr. Sindermann with a due process hearing and thus violated his constitutional rights.[5]

To the question of whether due process is called for, you should remember that due process is due when a constitutional right may be involved. The State may not exact a penalty for using what is rightfully one's own--a teacher or a student may be entitled to speak our or assemble under the circumstances. Some impermissible reasons which have caused the courts to rule in teachers' favor are 1) where a male teacher grew a beard and was fired by the board;[6] 2) some teachers were active in the union and were dismissed, but were ordered reinstated.[7] In Oregon, a high school teacher was dismissed for her homosexuality.[8] In all these cases, action was brought under the Civil Rights Act of 1871,[9] a public law enacted by the Congress to hasten the granting of civil rights to freedman after the War. In all three cases, board members had to pay personal damages, since the Act says that any person who under color of state law "deprives another of his civil rights shall be answerable to that person in a civil suit," which

[5]The official Faculty Guide read in part:"Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." It was this "understanding" which the Court held amounted to giving Sindermann a property right in his job after 10 years in it.

could include damages against the board members as individuals.

If there is some doubt about whether the interest being affected amounts to a constitutional right, the better decision is to yield to the doubt, and afford due process to the accused. One can hardly be penalized for being fair, and one can be in trouble in denying fairness to those whose interests are at stake.

Minimal essentials of due process. Once it has been decided that due process is in order, the second question then is, "How much due process?" In searching for an answer, the school administrator is immediately struck with the reluctance of the courts to set rigid standards, preferring instead a case by case approach. One court said that perhaps/due process "is the rule that all persons are entitled to be informed as to what the State commands or forbids."[10] Courts usually try to determine whether the rule complained of was vague, or ambiguous and whether the accused knew what he was doing when he broke it. The Supreme Court stated that "the procedural rule that may satisfy due process in one context may not necessarily satisfy due process in every case."[11] Recently, a Nebraska federal district judge held that "the very nature of due process negates any concept of inflexible procedure universally applicable to every imaginable situation; unlike some legal rules, due process is not a technical conception with a fixed content unrelated to time, place, and circumstances."[12] From these sources, one can imagine the confusion which surrounds this second question, "How much due process?" is due?

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[6]Lucia v. Duggan, 303 F.Supp. 112 (Mass. 1969).

[7]McLaughlin v. Tilendis, 398 F.2d 287 (Ill. 1968).

[8]Peggy Burton v. Cascade School Dist. UHS No. 5, 353 F.Supp. 254 (Ore. 1973).

[9]Cited as 42 U.S.C.A. § 1983.

[10] Gougen v. Smith, 471 F.2d 47 (Mass. 1972).

[11]Bell v. Burson, 91 S.Ct. 1586.

[12]Graham v. Knutzen, 351 F.Supp. 642 (Nebr. 1972).

There is almost universal acceptance of the idea that due process requires some type of hearing, and that this hearing must occur before state action is taken. In a recent case in Georgia, a probationary teacher was held to have been illegally dismissed because the hearing she was accorded had been given her after the board had already determined to terminate her contract.[13] Since it occurred during the life of her contract, she was entitled to recover the unpaid portion of her wages less any wages she had earned after termination of the contract by the board.

A hearing suggests a notice, so we turn now to a consideration of what constitutes proper notice. Purpose of a notice is to enable the teacher to prepare a defense, but the notice may still be legal and oral. A teacher in Missouri was disturbed because of the presence in his high school of army recruiters. In his algebra classes he urged his students to drive the recruiters out, although no disruption occurred. He confronted the recruiters in the hallway, and made a scene. The principal told the teacher that there would be a meeting of the board the next evening, and that he should be in attendance "to go into this matter further." On advice of counsel, the teacher did not attend the meeting, whereupon the board terminated him. The court held that the teacher need not have received written notice of the charges in advance of the meeting, and that his failure to appear at the board meeting called to hear his side of the story amounted to a voluntary and knowing waiver of his right to procedural due process of law.[14]

This case suggests that time is a very important consideration in due process cases.Ordinarily, a reasonable length of time is provided to prepare

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[13]Bhargave v. Cloer, 355 F.Supp. 1143 (Ga. 1972).
[14]Birdwell v. Hazelwood Dist., 352 F.Supp. 613 (Mo. 1972).

a defense. Where there is a crisis situation, however, as here, a countervailing state interest (the board's right to restrict the teacher to the teaching of algebra) may take precedence over the individual's interest in free speech. For example, where a school district had endured a long and divisive strike by teachers, the board issued a memorandum that teachers were not to discuss the strike in their classrooms witout the express permission of the principal. When a teacher, ignoring the memo, discussed the strike with his class, he was dismissed and sought reinstatement in court. The court, however, held for the board, with the explanation that because of the acrimony and bitter dispute resulting from the strike, the board's memo was within its legal powers to enforce.[15]

These cases, I believe, illustrate the point I started out to make: i. e., that procedural due process is circumstantial and evasive.

> The required <u>form</u> that procedural due process is to take in any given case must be accommodated to the facts in each case. A fundamental requirement of due process is the <u>opportunity</u> to be heard at a meaningful time and in a meaningful manner. This opportunity must be appropriate to the nature of the case. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [16]

Thus, the Supreme Court, recognizing the varied nature of due process, and its relationship to any given set of circumstances, goes case by case toward a fuller definition of what due process consists of. It is a little like Justice Brennan, in discussing a defintion of pornography, "As to defninition, I am not so sure, but I know it when I see it." This might suggest that school boards and administrators must let their consciences

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[15]Nigosian v. Weiss, 343 F.Supp. 757 (Mich. 1971).

[16]Cafeteria and Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

have full rein, relying not so much on whether due process is or is not required, as on their innate feeling for fairness in dealing with employees and students.

Teachers and Due Process

A teacher does not have a right to work for the State, but where he or she is already employed, the board may not terminate the contract for an impermissible reason, or on grounds other than that which they select as the basis for their action. A teacher in Iowa was dismissed after ten years of faithful service because her students did poorly on the annual achievement tests. The court ordered her reinstated, holding that she had a "property" interest recently enunciated in the Roth and Sindermann decisions.[17] And in Florida, the courts eventually upheld a $100 fine levied against striking teachers there, deciding that the fines amounted to liquidating damages, and since they had been negotiated, were not in contravention of the due process clause of the Fourteenth Amendment.[18]

The Supreme Court has agreed to hear two maternity leave cases in its fall term, so that question is now in limbo. However, due to the EEOC and other guidelines in most states, school boards are revising their maternity leave p olicies to come more into line with the due process clause. One interesting revision has it that all female teachers may receive maternity leave with pay "if they were married at the time of conception." Trying to police that one ought to give some worthy administrator a sleepless night or two.

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[17]Scheelhaase v. Woodbury Central Comm. Sch.Dist., FDC N.D. Iowa No. 71-C-3029-W, Nov. 2, 1972.

[18]National Education Association v. Lee Co.Bd. of Pub.Instr., 467 F.2d 447 (Fla. 1972).

Students and Due Process

Student freedoms flow from Gault and Tinker and are in effect a declaration of independence for American youth. In Gault, the Supreme Court said that Americans cannot have a double standard of justice, one for children and another for adults.[19] Then, shortly thereafter, the Court strengthened and clarified its stand where in Tinker, it said that "state-operated schools may not be enclaves of totalitarianism."[20] In so doing, it changed the entire thrust of American public education, and opened a new era of involvement by students as "persons" with full consitutional rights in school as well as out.

Student discipline. Due process is important at this point because the courts have held that in the exercise of its power to operate the public schools, boards may do that which is necessary to control and discipline pupils, and that there need be no due process unless the board's actions are clearly arbitrary, capricious or outside the board's powers to perform. For example, the Fifth Circuit Court of Appeals said of corporal punishment:

> Administering corporal punishment without due process of law is not inherently unconstitutional, because if the punishment is unreasonable and excessive, it is no longer lawful, and the perpetrator of it may be criminally and civilly liable. The law and policy do not sanction child abuse.[21]

Can it be said that the courts are hesitating to deprive boards of the right to punish children corporally because they fear that without it boards would be unable to maintain orderly schools? A federal district judge in Pennsylvania had another answer. He allowed a parent to veto corporal punishment for her son, but with this warning should she fail to do her part of the bargain:

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[19]In re Gault, 87 S.Ct. 1428 (Ariz. 1967).

[20]Tinker v. Des Moines School Board, 393 U.S. 503 (Iowa 1969).

[21]Ware v. Estes, 328 F.Supp. 657, affrmd, 458 F.2d 1360 (V Circ. 1972), cert. denied, _____U.S._____(1972).

> A parent may veto corporal punishment for his own child but he must be prepared to discipline his errant child himself. The parent must actively, promptly and effectively assert his authority so that the other children will not be hampered in their educational pursuits and school activities will not be disorganized. As always, with rights goes responsibility.[22]

One wonders that should the parent fail to carry out his part of the bargain, whether the principal might not go to court asking for a contempt order against the parent. At least one judge is willing to experiment with alternatives.

Other means of controlling students have recently come in for some bad times. In contesting Wisconsin's compulsory attendance law, the Amish Yoder heard the Supreme Court speak for the first time that compulsory attendance isn't all that great. Said the Supreme Court, "However strong the State's interest in universal compulsory attendance, it is by no means absolute to the exclusion or subordination of all other interests."[23] The case is historic in that it is the first time that the Court has questioned the State's right to compel attendance in the public schools.

Detention after school was upheld in Nebraska where a federal district judge held that "it is not unconstitutionally vague" referring to a board rule which specified detention after school for unexcused abseenteeism and tardiness and for skipping school.[24] And in Illinois, a state court held that "no cause of action derives from a teacher's verbal chastisement in the absence of malice or wantonness."[25]

Other means of punishment of students have not come off so well. As early as 1943, in the now-famous flag salute cases, the Supreme Court held that the Fourteenth Amendment protected members of Jehovah's Witnesses in school to the extent that a board could not expel a student for refusing on religious grounds

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[22]Glaser v. Marietta, 351 F.Supp. 555 (Pa. 1972).

[23]Wisconsin v. Yoder, 92 S.Ct. 1526 (1972).

[24]Fielder v. Bd. of Educ., 346 F.Supp. 722 (Nebr. 1972).

to salute the United States flag.[26] On that occasion the Court said in part:

> Must a government of necessity be toostrong for the liberties of its people, or too weak to maintain its own existence? The answer in the past has been in favor of strength. But the Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures, boards of education being no exception. That boards are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Exclusions from school or from extra curricular activities have recently been frowned upon by the courts. In Ohio, a young honor student, a senior in high school, was excluded from baseball in his last year for violating a board rule specifying that anyone "who contributes to the pregnancy of a girl out of wedlock" shouldbe excluded automatically. But young Davis was an excellent baseball player. Exclusion would cost him a college scholarship and an opportunity to be seen by the big league scouts who pestered him to join their club. Basing his case on the board's rule being an invasion of his marital privacy, the youth was successful. "What greater invasion of marital privacy can there be than one which could totally destroy the marriage itself?" asked the judge in saying that the board's rule could not stand.[27]

Suspensions may not extend beyond a reasonable number of days, because an education is important enough to call for legal action where one suspension may be added to another.[28] A federal district judge ordered the Omaha board of education to prepare a due process procedure to end a practice alleged to be discriminatiory in that it succeeded in adding suspension to suspension, and delayed a full hearing on the merits.[29] Other courts have said that guilt or innocence is not relevant; students do have a constitutional right to a hearing before being suspended for any considerable length of time.[30]

26West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

27 Davis v. Meek, 344 F.Supp. 298 (Ohio 1972).

28 Brown v. Bd. of Education, 347 U.S. 483 (Kans. 1954) where the Supreme Court asked the rhetorical question: Can a student reasonably be expected to succeed in life if he is denied the opportunity of an education?

Student freedom of expression. It appears that the student's right to know far exceeds the teacher's right to teach, since the former are not restricted by contract or propriety as are teachers. There is still no independent free-standing right to academic freedom in the classroom. The evolution cases and the speaker ban cases illustrate that the student is virtually unlimited in his right to knowledge, except insofar as he may not be subjected to obscenity in the classroom. Perhaps the new Miller v. California case recently handed down by the Supreme Court will have some effect on what is and what is not acceptable in classrooms. It seems ironic that the student can buy it at the corner drug store, or go to the movies, and see that which the schools are yet unable to offer. In some ways, it means that his time in school may be interfering with his education. A teacher sought permission to conduct a debate in his 7th grade class on the subject of abortion, but the superintendent denied him this right, although there was an agreement between the teachers' association and the board that controversial subjects would be fully explored in school. The court held that the teachers' agreement was illegal as ultra vires the power of the board to promulgate, hence it was unenforceable, since it delegated matters to an association of teachers which rightfully were for the board to decide.[31]

From the cases of record, it appears that students may be free to publish and distribute their own underground newspapers so long as they practice good journalism and do not libel someone. In Houston, a principal objected to a four letter word in a student publication, which was used to describe the school

29 Graham v. Knutzen, 351 F.Supp. 642 (Nebr. 1972).

30 Black Students ex rel. Shoemaker v. Williams, 317 F.Supp. 1211 (Fla. 1970).

31 Bd. of Educ. of Rockaway Tp. v. Rockaway Tp. Educ. Assn., 295 A.2d 380 (N.J. 1972).

as being in pretty bad shape, in a lousy state of affairs. Because the copy for the newspaper had to be sanctioned by the principal, the court held that such prior restraint amounted to a denial of due process, using in part these words:

> A publication is not obscene merely because it contains a blunt, Anglo Saxon word. The Old Testament contains passages of sexual candor, and four letter words are not (being) used for the first time in the literature of the Seventies.[32] In our societythe old and the traditional is daily being challenged by the new and the unprecedented. Those who seek to guard against the encroachment of taboo words appear to be waging defensive warfare. . . .For the Christian the truly obscene . . .is the word "NIGGER" from the sneering lips of a Bull Connor. (Quoting from Howard Moody, Christianity and Crisis, March 22, 1971, at 45.[33]

Administrators and Due Process

What are the school administrator's rights to due process of law? The answer lies depending upon the role which the administrtor is playing at the moment. In general, administrators play three roles: (1) in loco parentis , in which his actions are largely protected as the foster parent to the child; (2) the role of private citizen, in which he must obtain a search warrant the same as any other private citizen; and (3) the role of agent of the state, in which he poses as the representative of the board of education and represents management, or the adversary role to teachers and students. Some examples are in order.

A principal searched the locker of a high school student and uncovered contraband which led to the student's eventual arrest and conviction for burglary. The search was conducted without a search warrant. The Supreme Court of Kansas held that the principal had not only the right but the duty to inspect student lockerss, since he stood in loco parentis to the children and was

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[32]U.S. v. Head, 317 F.Supp. 1138 (La. 1970).
[33]Sullivan v. Houston Ind.Sch.Dist., 333 F.Supp. 1149 (Tx. 1971).

responsible for their welfare while in school. In this role, he did not need to obtain a warrant.[34]

In some districts, the drug game has changed from the lockers to the parking lots and automobiles driven by the students. Search of an automobile is a very different kind of search than a warrantless search of a student's locker. For one thing, an automobile is not school property, but private, even though parked on school property. Another is that the role of the principal has now changed, from one who is out to protect the child, even the owenr of the car, to that of a gatherer of evidence to be used against the student in a court of law. Unless he can obtain the permissionof the student owner, he must obtain a warrant, even though the car is parked on school property.

A case which arose in Texas is in point. In an effort to head off the marijuana trade, the schoolboard members and administrators enacted a resolution which prohibited student possession of dangerous drugs and provided for expulsion of those students who might violate the rule, even though there was no reference in the rule to other equally heinous criminal acts. The rule was to apply automatically which raised the question of due process. The court held that the rule was valid. Three students were expelled under the rule. A fourth, however, was expelled on evidence obtained by an illegal search. The board had taken care to see that the three boys had been given notice and proper hearings, but in the latter case, that of James Caldwell, the board had failed to follow its own due process rule by conducting their own private investigative activites before the local grand jury. The court said in part:

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[34]State v. Stein, 456 P.2d 1 (Kans. 1969).

> . . .The fact that the board's policy provides for procedural due process is meaningless unless the board itself adheres to its own rules and avoids any participation by any member in the prosecution or the gathering of evidence. For the board to act as investigator, prosecutor, judge and jury makes a mockery of the notion of a fair hearing.[35]

To the extent that the school administrators plays the role of an investigator, prosecutor, judge and jury, he steps outside the protection of his in loco parentis role, and becomes in effect an agent of the state. He cannot have it both ways; either he is a defender and supporter of the student, the role of the child advocate, there to help the student, or he is on the state's side and in league with the police. So when you play the big daddy role, be sure to stay in character and you won't be questioned; step outside and you are vulnerable indeed.

Finally, what of the role of the administrator as a private citizen? A Kentucky case which arose in 1970 illustrates what can happen when a superintendent was removed from his position for cause on the grounds that he had engaged in an effort to get certain members elected to the board. In upholding his right to be politically active, the court sagely used these words among others:

> It would be ideal of course if no part of the school system could be invaded by the tides and currents of politics. . . . A school superintendent, however, cannot be expected to confine his extracurricular activities to bird-watching while a covetous rival is out campgaigning for a school board to unseat him. So, if he remains within the confines of propriety, neither neglecting his duties nor using his powers to coerce those who are subject to his official influence, he is free to engage in political activity, whether it concerns school elections or otherwise.[36]

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[35]Caldwell v. Cannady, 340 F.Supp. 835 (Tx. 1972).
[36]Bell v. Board of Education, 450 S.W.2d 229 (Ky. 1970).

The court, however, could not resist the temptation to conjecture on what would happen if one faced up to the political realities:

> But. . .if he loses, his record of performance in office had better be above reproach, because the winners also are human, and will scrutinize his armor for an Achilles heel.

Ah, what a price the administrator must pay for exercising his rights of citizenship!

This Kentucky superintendent objected to hs dismissal by the board on the grounds that none of the members disqualified themselves because of bias or prejudice against him. The court acknowledged that where the board is both judge and jury, the prospects of a fair trial are diminished considerably.

> It might as well be frankly recognized as a matter of judicial notice that school board members who prefer charges against a superintendent or teacher are likely to be prejudiced from the inception. The cold fact of formal charges evinces the accusers' predisposition. Though they might (and probably did) disclaim it, human nature is too well known for pretense to be indulged. . . .The object of the statute is to create a record by which the board's action may be tested for arbitrariness. The prospect of a fair trial at the board level is bound to be, in most instances, an illusion.

The superintendent always has recourse to the courts, however, if he feels that he has been denied protection under due process. In a rather philosophical vein, the court took judicial notice of the relationship of the superintendent to the board of education, using in part these words:

> The evidence does not show that he neglected his work, nor did he lean on his subordinates to support his plan. With regard to his own political activity, the charges probably do not state a ground for removal. . . .A school superintendent may not intermeddle with the election of the members of the board, farther than to see that qualified and fit persons are selected as candidates and placed on the ballot. . . .Self-preservation (to perpetuate himself in office) is the first law of life, and man's strongest instinct. . . .Unfortunately, human nature is an unavoidable risk of the game, and that is precisely what happened in this case (his candidates lost).

But some risks pay off. A principal who correctly ended the practice of various people of buying groceries through the school lunch program, and who was removed for his pains, was ordered reinstated by the court, with the

comment by the judge that, instead of thinking of firing him, the board ought to be thinking about giving him a medal. And so the game of political espionage goes.

Summary and Conclusions

Due process is not for adults alone, but is a constitutional right of children in school as well as out. Like all constitutional freedoms, the right to due process is not without its limitation, however. But it is the best our nation can do to place between the State and one or more of its citizens a protection which makes us all as individuals equal to us all as a nation.

One must first ask whether due process is needed. If a citizen stands to lose a valued and protected constitutional right, and that at the hands of the state, then due process is indeed indicated. Just what will constitute a minimal procedural guarantee depends very much upon the fact situation in each and every circumstance.

It is apparent that an accused is due notice of his shortcomings, and an opportunity to appear and face his accusers and refute their testimony. Further than that, the accused in most instances is entitled to counsel, to a fair and impartial hearing, and the right to appeal his case to other authority.

The essence of due process is fairness -is it fair? It seems to be unfair for a teacher or administrator to take on the duties and responsibilities of a person standing in loco parentis, then turn that role into one in which he or she conducts an investigation resulting in some form of punishment for the accused student. The role conflict arises where the administrator or teacher steps outside the protection of his in loco parentis role, and becomes in effect, an agent of the state. So if you are called upon to decide what

role to play in relationship to a child in your school, play it safe and protect the child's interests--in effect, be a child advocate--rather than taking up the role of the police prosecutor.

Let the police wear the blue caps, that's their job. Yours is to try to get kids involved in the new schools which are abound to come forth now that due process is mandated in public schools. Your job is to defend, support, protect and promote the interests of childlren, to the end that the State shall nowhere nor at any time impose its sovereign will upon the child without first giving that child due process of law.

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